IN THE MISSOURI SUPREME COURT

No. SC92539

ANITA JOHNSON,
Respondent,

vs.

J.F. ENTERPRISES, LLC d/b/a JEREMY FRANKLIN SUZUKI OF KANSAS CITY, and JEREMY FRANKLIN,
Appellants

and

AMERICAN SUZUKI MOTOR CORPORATION,
Defendant.

On Appeal from the Circuit Court of Jackson County
Honorable W. Brent Powell, Circuit Judge
Case No. 1016 CV 37638

SUBSTITUTE BRIEF OF THE RESPONDENT

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Preliminary Statement

Respondent Anita Johnson purchased a 2008 Suzuki XL 7 from Appellant. As part of the sale, Respondent executed (1) a Retail Installment Contract, (2) a Buyer's Order and (3) an Arbitration Agreement. Respondent filed suit in the Circuit Court of Jackson County, Missouri. Defendant filed a Motion to Dismiss, or in the Alternative, Motion to Compel Arbitration. The trial court denied the Motion, and Appellant appeals. This case is factually on all fours with *Krueger v. Heartland Chevrolet, Inc.* 289 S.W.3d 637 (Mo. Ct. App. 2009). In *Krueger,* the defendant had respondent sign three (3) documents: (1) a Retail Installment Contract, (2) a Buyer's Order and (3) an Arbitration Agreement. The Retail Installment Contract purported to be "the complete and exclusive statement of the agreement between us, except as we may later agree to modify in writing." *Id.* at 639. This is the identical language in the Retail Installment Contract in the case at bar. (L.F. 60-61). In *Krueger,* the Court refused to compel Arbitration, hoding that due to the merger clause, the Retail Installment Contract superceded the Buyer's Order and the accompanying Arbitration Addendum. *Id* at 639.

The formation of the Arbitration Agreement in this case is fatally flawed rendering the Arbitration agreement wholly unconscionable under *Brewer v. Missouri Title Loans,* 364 S.W.3d 486 (Mo. banc 2012). Appellants provided Respondent no time to read or negotiate the documents, used "rush and hurry" tactics, and forced Respondent to give up substantive rights to a full recovery in pursuing her case.

Table of Contents

Table of Authorities

Cases

Constitution of Missouri

Revised Statutes of Missouri

Missouri Supreme Court Rules

Jurisdictional Statement

This is an appeal of a trial court's denial of a motion to compel arbitration. This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. Thus, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction. Appellants timely appealed to the Missouri Court of Appeals, Western District. This case arose in Jackson County. Under Section 477.070 R.S.Mo., venue lay within that district of the Court of Appeals. The Court of Appeals designated this case as No. WD 73990.

On March 27, 2012, the Court of Appeals issued an opinion affirming the trial court's judgment. Appellants filed a timely Motion for Rehearing and Application for Transfer in the Court of Appeals, both of which were denied. Appellants then filed a timely Application for Transfer in this Court pursuant to Rule 83.04. On July 3, 2012, the Court sustained that application and transferred this case.

Therefore, pursuant to Mo. Const. art. V, Section 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Response to Appellants' Statement of Facts

Respondent agrees with Appellant's Statement of Facts with certain exceptions.

Appellant's statement of facts alleges that the Arbitration Agreement was signed subsequent to the Retail Installment Contract. (Appellant's brief p. 4, referring to LF 62 and LF 111.) Those references to the record do not support the allegation that the Arbitration Agreement was signed after the Retail installment contract, however. The reference to LF 111 makes the assertion that the Arbitration Agreement was signed after the Retail Installment contract, and makes reference to an affidavit signed by Respondent Jeremy Franklin. However, Mr. Franklin's affidavit is silent regarding when the Arbitration Agreement was signed vis-a-vis the other purchase documents. (L.F. 58-59).

RESPONDENT'S STATEMENT OF ADDITIONAL FACTS

When purchasing the Suzuki, Respondent was kept waiting a long time. (L.F. 104). After being made to wait for several hours, Respondent was shown into the Finance and Insurance office. (L.F. 104). While in the Finance and Insurance office, Respondent was given many documents to sign. The man did not give Respondent time to read the documents, but said "sign here, here and here" and rushed Respondent. (L.F. 104). Respondent was not given a chance to thoroughly read the documents. (L.F. 104). Respondent was not given the chance

to change or negotiate any of the terms of the documents. (L.F. 104). The documents were pre-printed and completely filled out before they were shown to Respondent. (L.F. 104). Respondent was never shown the Arbitration Agreement, nor was she given the rules. (L.F. 104). The word "Arbitration" was never mentioned to Respondent. (L.F. 104). At the time she bought the Suzuki, no one told Respondent that if she had a problem she could not bring her claims in court. (L.F. 104). At the time she bought the Suzuki, Respondent was never told that she was waiving her right to participate in a class action, to a jury trial, to a court trial, or other valuable rights. (L.F. 104).

Response to Appellants' Points Relied On

I. The trial court did not err in denying Appellant's Motion to Compel Arbitration *because* the Parties' Retail Installment Contract superseded the Arbitration clause and the law of Missouri is that the order in which the documents were signed is irrelevant *in that* the Retail Installment Contract, which did not contain an agreement to arbitrate, contained a merger clause stating it was the complete and exclusive statement of the agreement between the parties.

(Response to Appellant's Point I)

Krueger v. Heartland Chevrolet, Inc, 289 S.W.3d 637 (Mo. App. W.D. 2009)

Walker Mobile Home Sales, Inc., v. Walker, 965 S.W.2d 271 (Mo. App. W.D. 1998)

Brewer v. Missouri Title Loans, 364 S.W.3d 486 (Mo. banc 2012).

II. The trial court did not err in denying Appellants' Motion to Compel Arbitration *because* the Arbitration agreement Appellants sought to enforce is wholly unconscionable and its formation was fatally flawed *in that* the Arbitration agreement was presented to Respondent in a stack of documents on a "take it or leave it" basis with no explanation of what the documents meant, no time to read the documents, and Respondent was told to sign the documents with no real opportunity to negotiate the terms; as well the Arbitration agreement impairs Respondent's ability to seek full compensation and does not provide for finality.

(Response to Appellant's Point II)

Ruhl v. Lee's Summit Honda, 322 S.W.3d 136 (Mo. 2010)

Netco v. Dunn, 194 S.W.3d 353 (Mo. 2006)

Dunn Indus. Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003)

Brewer v. Missouri Title Loans, 364 S.W.3d 486 (Mo. banc 2012)

Argument

I. The trial court did not err in denying Appellants' Motion to Compel Arbitration *because* the Parties' Retail Installment Contract superseded the Arbitration clause and the law of Missouri is that the order in which the documents were signed is irrelevant *in that* the Retail Installment Contract, which did not contain an agreement to arbitrate, contained a merger clause stating it was the complete and exclusive statement of the agreement between the parties.

(Response to Appellants' Point I)

Standard of Review

The judgment will be affirmed if it is supported by substantial evidence, it is not against the weight of the evidence, and does not erroneously declare or apply the law. *Brewer v. Missouri Title Loans,* 364 S.W.3d 486, 492 (Mo. banc 2012). "In reviewing the trial court's decision, this Court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." *Trimble v. Pracna,* 167 S.W.3d 706, 716 (Mo. banc 2005). The issue of whether a motion to compel arbitration should have been granted is a legal question subject to de novo review. *Brewer v. Missouri Title Loans,* 364 S.W.3d 486, 492 (Mo. banc 2012).

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Under the *Krueger* doctrine, a Retail Installment Contract that contains a merger clause is the full agreement between the parties and other documents that purport to compel arbitration which are not referred to or incorporated into the Retail Installment Contract are irrelevant and unenforceable.

This case is factually on all fours with *Krueger v. Heartland Chevrolet, Inc.* 289 S.W.3d 637 (Mo. Ct. App. 2009). In *Krueger,* the defendant had plaintiff sign three (3) documents regarding a vehicle purchase, (1) a Retail Installment Contract, (2) a Buyer's Order and (3) an Arbitration Agreement. The Retail Installment Contract purported to be "the complete and exclusive statement of the agreement between us, except as we may later agree to modify in writing." *Id.* at 639. This is the identical language in the Retail Installment Contract in the case at bar. (See Defendant's Exhibit B). In *Krueger,* the Arbitration Agreement was set out in full in a separate document, and was also again repeated verbatim in the Buyer's Order. Despite that fact, the Court held that due to the merger clause, the Retail Installment Contract superceded the Buyer's Order and the accompanying Arbitration Addendum. *id* at 639, citing *Walker Mobile Home Sales, Inc. v. Walker,* 965 S.W.2d 271 (Mo. Ct. App. 1998), and found that the plaintiff was not compelled to arbitrate.

The Retail Installment Contract merger language presented here is identical to the in *Krueger, supra.* Both Retail Installment Contracts contain this language:

> Oral Agreements or commitments to loan money, extend credit, or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrower(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in ths writing, *which is the exclusive statement of the agreement between us, except as we may later agree in writing to modify it.*

(Italics in the original, *Krueger opinion,* 289 S.W.3d at 639.

Appellants argue, without any factual support in the record, that the Arbitration Agreement was signed after the Retail Installment Contract. And as a result, Appellants argue, the Arbitration Agreement modifies the Retail Installment Contract. This argue lacks merit for many reasons.

First, there is no support in the record for the proposition that the Retail Arbitration Clause was signed after the Retail Installment Agreement. Respondents direct the Court and Counsel to the affidavit of Jeremy Franklin to support the allegation that the Arbitration Clause was signed after the Retail Installment Agreement. (L.F. 58-59). However, Mr. Franklin's affidavit does not support this contention. In fact, Mr. Franklin's affidavit is silent on this issue.

Second, the Retail Installment Contract does not refer to or incorporate the Arbitration Clause. Third, the Arbitration Agreement does not incorporate or refer to the Retail Installment Contract. The Arbitration Agreement cannot be said to modify a contract which it does not even mention or refer to. Finally, assuming for the sake of argument that Respondent signed the Arbitration Agreement after the Retail Installment Contract, which Respondent denies, the order in which the documents were signed is of no import. Rather, the *Krueger* court was persuaded by the fact that the Retail Installment Contract did not refer to or incorporate any other documents executed by the parties. *Krueger,* 289 S.W3d at 639.

Moreover, in this context alleging that the order in which the documents were signed somehow can affect Respondent's rights is not tenable. The record below is clear: Respondent was given no opportunity to read the documents. She was given no opportunity to understand the documents. If she was given no time to read or understand the documents, how could she have agreed that a document she just now signed was amended by another document she just now signed? Especially when the alleged "subsequent" document makes no mention of the previous document which it purports to amend.

In *Walker,* a customer signed a purchase agreement to acquire a mobile home from a dealer. *Walker,* 965 S.W.2d 273. The buyer also signed a Retail Installment Contract to finance the purchase. *Id.* The dealer was subsequently unable to sell the Retail Installment Contract to a lender, and the dealer decided so sue under the purchase agreement. *Id.* at 274. The buyer appealed from a

judgment in favor of the dealer. This court held that the retail installment contract superceded the other contracts between the parties because it contained a clause stating it was "the only agreement." *Id.* at 275. If the dealer wanted to condition the sale of the mobile home on the approval of third-party financing, it could easily have added such a provision. *Id.*

Just as Judge Hardwick found in *Krueger,* JF Enterprises is bound by the terms of the Retail Installment Contract as the complete and exclusive agreement with Respondent for the purchase of the vehicle. JF Enterprises could have included or incorporated an arbitration provision in the Retail Installment Contract but did not do so.

The trial court specifically mentioned *Krueger v. Heartland Chevrolet, Inc.* 289 S.W.3d 637 (Mo. Ct. App. 2009) in its decision refusing to compel arbitration in this case. (L.F. 133). However, correctness of the decision, and not the route taken, is the paramount concern. *Trimble,* 167 S.W.3d at 716.

Appellants next raises two arguments that are not preserved in the Point Relied On. Point I argues that Respondent failed to demonstrate that *Krueger* applies as Respondent failed to present evidence regarding the order the documents were signed. However, in the Argument section of their brief, rather than tracking the Point Relief On, Appellants advance two new arguments.

First, Appellants argue that *Krueger* distinguishable and therefore, the trial court erred in refusing to compel arbitration. That argument is a departure from Point I which states that Respondent made an insufficient showing under *Krueger.*

Second, and perhaps more important, Appellants argue that the rationale employed by the court of appeals radically departs from Missouri precedent and should not be adopted. Point I is silent on this argument as well. The crux of Appellants' argument appears to be that somehow the Court of Appeals seeks to apply *Krueger* to post-contract amendments.

Both of these arguments were omitted from the Point Relief On, and should on and should be disregarded by this Court. Rule 84.04 (e) states in pertinent part "The argument shall be limited to those errors included in the "Points Relied On." These arguments go well beyond the Point Relied On and should be disregarded. Rule 84.04(e), *Falls Condominium Owners' Association, Inc. v. Sandfort,* 263 S.W.3d 675, 679 (Mo. App. S.D. 2008). "Compliance with Rule 84.04 briefing requirements in mandatory in order to ensure that appellate courts do not become advocates by speculating on facts and arguments that have not been asserted." *Id.* at 676-77 (citing *Wilson v. Carnahan,* 25 S.W.3d 664, 667 (Mo. App. W.D. 2000). *Falls* went on to state, "It is not the function of the appellate court to serve as advocate for any party to an appeal." *Id.* (*quoting Shochet v. Allen,* 987 S.W.2d 516, 518 (Mo. App. E.D. 1999).

Appellants did not comply with Rule 84.04. The failure to comply with Rule 84.04 preserves nothing for review. Appellants cannot enlist this Court as an advocate. Therefore, these arguments must be disregarded.

II. The trial court did not err in denying Appellants' Motion to Compel Arbitration *because* the Arbitration agreement Appellants sought to enforce is wholly unconscionable and its formation was fatally flawed *in that* the Arbitration agreement was presented to Respondent in a stack of documents on a "take it or leave it" basis with no explanation of what the documents meant, no time to read the documents, and Respondent was told to sign the documents with no real opportunity to negotiate the terms; as well, the Arbitration agreement impairs Respondent's ability to seek full compensation and does not provide for finality.

(Response to Appellant's Point II)

Standard of Review

The judgment will be affirmed if it is supported by substantial evidence, it is not against the weight of the evidence, and does not erroneously declare or apply the law. *Brewer v. Missouri Title Loans,* 364 S.W.3d 486, 492 (Mo. banc 2012). "In reviewing the trial court's decision, this Court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." *Trimble v. Pracna,* 167 S.W.3d 706, 716 (Mo. banc 2005). The issue of whether a motion to compel arbitration should have been granted is a legal question subject to de novo review. *Brewer v. Missouri Title Loans,* 364 S.W.3d 486, 492 (Mo. banc 2012).

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An arbitration provision may be invalidated on the basis of such contract defenses as fraud, duress, or unconscionability. *Allied-Bruce Terminex COS v. Dobson*, 513 U.S. 265 (U.S. S.C. 1995)(emphasis added). The "Arbitration Agreement" presented here is procedurally and substantively unconscionable, which therefore, makes the provision unenforceable under Missouri law.

Brewer I provided that "There are procedural and substantive aspects to unconscionability. Procedural unconscionability relates to the formalities of the making of an agreement and encompasses, for instance, fine print clauses, high pressure sales tactics or unequal bargaining positions. Substantive unconscionability refers to undue harshness in the contract terms." *Brewer v. Missouri Title Loan, Inc.*, 323 S.W.3d 18 (Mo. banc 2010). In Missouri "[a]n unconscionable arbitration provision in a contract will not be enforced." *Id.* "Missouri law does not require the party claiming unconscionability to prove both procedural and substantive unconscionability. Under Missouri law, unconscionability can be procedural, substantive or a combination of both." *Id.*

Before a party may be compelled to arbitrate under the provisions of the Federal Arbitration Act, 9 U.S. C. Section 2, of which Appellants have claimed the Respondent should be forced to do, it must be determined that a valid agreement to arbitrate exists between the parties and the specific dispute falls within the substantive scope of that purported agreement. See *Netco, Inc. v. Dunn*, 194 S.W.3d 353 (Mo. 2006), wherein the Court held that before a Court may grant a party's Motion to Compel Arbitration under either the Missouri Arbitration Act or

the FAA, it must decide whether the agreement containing the arbitration provision is valid and legally binding, concluding that a valid agreement exists and the dispute at issue falls within that agreement. See also *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003).

9 U.S.C. Section 2 of the Federal Arbitration Act provides, however, that while written agreements to arbitrate are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, general applicable state law contract defenses such as unconscionability may be used to invalidate arbitration provisions without contravening the extent and scope of the Federal Arbitration Act. See *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo. App. 2003). This position was further set forth in *Allied-Bruce Terminex COS v. Dobson*, 513 U.S. 265 (U.S. Supreme Court 1995), in which the Court held that an arbitration provision may be invalidated on the basis of such contract defenses as fraud, duress, or unconscionability (emphasis added).

The Arbitration Agreement is unconscionable, which therefore, makes the provision unenforceable under Missouri law. The purported arbitration agreement was a preprinted form contract provided to the Respondent after she had agreed to purchase the 2008 Suzuki XL7. The Respondent was provided no opportunity to negotiate, change, or modify the agreement or provide any input into the preprinted written provisions of the Arbitration Agreement presented to her by the Defendant. Moreover, Respondent was never told what terms were contained in the documents put before her, nor the effect of signing the documents. Respondent

was presented the all of the sale documents as a take-it-or-leave-it proposal. Moreover, Respondent was not given time to read and understand the documents. She was simply told, "sign here, here and here." No meaningful choice or agreement was available to Respondent as to the preprinted terms and conditions contained within the Arbitration Agreement.

The Arbitration Agreement was contained in a stack of documents for Respondent to sign. The arbitration provisions requires Respondent to give up and waive:

- "RIGHT TO A TRIAL, WHETHER BY A JUDGE OR JURY
- RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER IN ANY CLASS CLAIM YOU MAY HAVE AGAINST US WHETHER IN COURT OR IN ARBITRATION
- BROAD RIGHTS TO DISCOVERY AS ARE AVAILABLE IN A LAWSUIT
- RIGHT TO APPEAL THE DECISION OF AN ARBITRATOR
- OTHER RIGHTS THAT ARE AVAILABLE IN A LAWSUIT"

It is unconscionable to force Respondent to give up such fundamental rights in a form pre-printed contract which Respondent was afforded no choice of negotiation or mutuality of obligation. Therefore, The Arbitration Agreement is an unconscionable contract that is not enforceable.

Appellants argue that the Supreme Court decision in *AT&T v. Concepcion* stands for the proposition that because most consumer contracts are contracts of adhesion, the state law defenses to contracts are no longer valid. Such an interpretation lacks merit as demonstrated by this Court in Brewer II, *Brewer v. Missouri Title Loans,* 364 S.W.3d 486 (Mo. banc 2012).

A. Procedural unconscionability involves the formation of the contract, which includes high pressure tactics used on the parties, fine print in the agreement, misrepresentation, and unequal bargaining power. See *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. App. W.D. 2005). In *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006). The Court held that a party opposing arbitration cannot prevail simply on an allegation that a preprinted contract is a contract of adhesion without other proof. That party has the burden to show that the contract was a contract of adhesion, a contract offered on a "take this or nothing basis" because the weaker party could not look elsewhere for a more attractive contract.

As set forth in *Funding Systems Leasing Corp. v. King Louie Intern., Inc.*, 597 S.W.2d 624 (Mo. App. 1979), the Court addressed the issues of procedural unconscionability in general with the contract formation process and on the fine

print of a contract, misrepresentation, or unequal bargaining position.

In the case at issue you have a contract that was provided to the Respondent after she had agreed to purchase the 2008 Suzuki XL7. The contract was presented in a preprinted form, of which there was no negotiation or input by the Respondent on the terms or conditions thereof. The Arbitration Agreement was not separately pointed out to Respondent. The Respondent was in an unequal bargaining position in that she was provided an agreement on a preprinted form contract by the Defendant of which she had no negotiation on the terms and no mutuality of obligation. The manner in which the Arbitration Agreement was presented to Respondent was procedurally unconscionable.

The arbitration provision is procedurally unconscionable due to surprise. One factor considered by many courts in evaluating whether a given contract provision is procedurally unconscionable is whether the party challenging the term was likely to be (and was in fact) surprised to learn of the term. Accordingly, a number of courts have noted that the lack of conspicuousness of the arbitration provision itself can contribute to procedural unconscionability. *See* *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 431 (5th Cir. 2004) (addressing "placement of the arbitration clause relative to the rest of the contract," in finding procedural unconscionability); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) (arbitration clause inserted in among various bill stuffers); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004); *Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1996). Courts note that in automotive sales and lease transactions it is also typical

for dealers to hurry consumers through the paperwork process, offering no opportunity to read the documents, and sometimes not even providing copies of the paperwork at the time of signing. *See* *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F Supp. 2d 1087 (W.D. Mich. 2000).

Here Respondent had no idea that there was an Arbitration Agreement due to the method it was hidden from Respondent. Respondent was given a stack of documents in a rush and hurry fashion. She was told simply, "sign here, here and here" and not given a chance to read the documents. She was instructed by the Defendant to sign the documents and she complied. (L.F. 104). The Arbitration Agreement was buried in a pile of papers and was not conspicuous. No one ever mentioned the word "Arbitration" to Respondent. This surprise renders the arbitration provision unconscionable at the formation stage. The very factual basis cited here is very similar to that in Brewer II. In this case, respondent must give up her many substantial rights: class treatment, injunctive relief, awards over $100,000, and "other right that you may have in court." (L.F. 62) However, appellants reserve the right to use self help to obtain possession of the collateral.

B. Substantive unconscionability involves the nature of the contract itself. Here, Defendant seeks to have Respondent waive and forego all rights she has through the U.S. Constitution, The Seventh Amendment, The Missouri Constitution, and Missouri Statutes, all over the purchase of a vehicle in which Defendant failed to disclose certain facts relating to its condition when the contract was entered into the purported provision requires Respondent to waive

fundamental, substantial rights, including:

- "RIGHT TO A TRIAL, WHETHER BY A JUDGE OR JURY
- RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER IN ANY CLASS CLAIM YOU MAY HAVE AGAINST US WHETHER IN COURT OR IN ARBITRATION
- BROAD RIGHTS TO DISCOVERY AS ARE AVAILABLE IN A LAWSUIT
- RIGHT TO APPEAL THE DECISION OF AN ARBITRATOR
- OTHER RIGHTS THAT ARE AVAILABLE IN A LAWSUIT"

While the inquiry may be limited to the formation of the arbitration agreement, an examination of the terms of the agreement must be done on a case-by-case basis. *Brewer v. Missouri Title Loans,* 364 S.W.3d 486, 490-91 (Mo. banc 2012)(citing *Concepcion).* This result necessarily follows. Otherwise, *Concepcion's* discussion of the state law unconscionability defenses would be superfluous. *Brewer,* 364 S.W.3d at 490-91.

In *Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868 (Mo. App. 2005), the Court found an agreement to compel arbitration unconscionable and

unenforceable. An adhesion contract has been described as a form contract created and imposed by a stronger party upon the weaker party on a take-this-or-nothing basis, the terms of which unexpectedly or unconscionably limit the obligations of the drafting party. See also *Hartland Computer Leasing Corp., Inc. v. Insurance Man, Inc.*, 770 S.W.2d 525 (Mo. App. 1989). Substantive unconscionability or adhesion contracts usually involve the unequal bargaining power of a large corporation versus an individual and are often presented in preprinted form contracts. See *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. banc 1992).

In *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005), a customer had claimed a wireless telephone service provider had improperly made charges on a billing statement to the customer. The customer thereafter made claims under the Missouri Merchandising Practices Act and sought legal remedies. The wireless provider filed a Motion to Compel Arbitration, similarly as the Respondents had done in the present case. The Court found the arbitration to be unconscionable, and therefore, not enforceable. In discussing the nature of the procedural and substantive unconscionability, the Court found that the arbitration provision in fine print on the back side of the sheet was insufficient to call attention to the customer of their waiver of the substantial rights guaranteed under statutes and constitutions. In addressing substantive unconscionability, the Court examined adhesion contracts, which involve the unequally bargaining power of one versus another, which are often presented in preprinted form contracts. The

Court applied a reasonable expectations test, objectively applied, and found that the contract was substantively unconscionable, and was therefore unenforceable.

The very nature of Respondent's claim in this case is that the terms and conditions of the sale of the vehicle were not adequately disclosed to Respondent. A reasonable person would not expect that entering into a "Retail Installment Contract" form contract, which did not have an arbitration provision, would preclude a reasonable person from availing themselves of all rights by statute and the constitution. The purported agreement to arbitrate is procedurally and substantively unconscionable, and therefore, should not be enforced.

The "Arbitration Clause" attempts to negate a right expressly given to Respondent by the Missouri General Assembly and Missouri Revised Statutes Section 407.025.2 which permits attorneys' fees, punitive damages, and actual damages. Limiting all damages to $100,000 could limit one or all categories listed above. It is the circumvention of Respondent's statutory rights under the Missouri Merchandising Practices Act, is unconscionable, and renders its arbitration clause unenforceable. One Appellate Court considered the issue as follows: "A provision and a contract of adhesion that would operate to restrict the availability of an award of attorneys' fees to less than that provided for in applicable law would under our decision today be presumptively unconscionable ... If the dispute were one where a prevailing party is entitled to attorneys' fees under state law for the benefit and protection of the public." See *Dunlap v. Burger*, 567 S.E.2d. 265 (W.V. at 202). See also *Floss v. Ryan's Family Steak House*, 211 F.3d. 306 (6th

Circuit 2000). The bottom line is that arbitration is only valid and fair if the parties were able to pursue and obtain the same relief that the law provided them in Court. Otherwise, the arbitration process is fundamentally flawed and unconscionable. See also *Ingle v. Circuit City Stores, Inc.*, 328 F.3d. 1165 (9th Circuit 2003). Because the arbitration clause limited the remedies, limitation and properly prescribed available statutory remedies, we again conclude that it is substantively unconscionable. See *Paladino v. Avnet Computer Techs*, 134 F.3d. 1054 (11th Circuit 1998). (Arbitration clause stricken because it limited remedies that would have been available in Court.)

In *Zemelman v. Equity Mut. Ins. Co.*, 935 S.W.2d 673 (Mo. App. 1996), explained an adhesion contract is a form contract created by the stronger of the contracting parties. It is offered on a take-this-or-nothing basis. In Missouri, a contract of adhesion is not automatically unenforceable, but rather considering the overall circumstances of the transaction and the relative bargaining position, only such provisions of the standardized form which fail to comport with such reasonable expectations and which are unexpected and unconscionably unfair are held to be unenforceable. See also *Hartland Computer Leasing Corp., Inc. v. Insurance Man, Inc.*, 770 S.W.2d 525 (Mo. App. 1989). Here, considering the take-it-or-leave-it circumstances of the transaction and the superior bargaining position of Appellants, the Arbitration Agreement is unexpected and unconscionably unfair, and accordingly, should be held unenforceable.

"An arbitration clause that defeats the prospect of class action treatment in a setting where the practical effect affords the defendant immunity is unconscionable" and therefore, unenforceable. See *Grossman v. Thoroughbred Ford, Inc.*, October 2009. In *Brewer v. Missouri Title Loan, Inc.*, 323 S.W.3d 18 (Mo. banc 2010), the court recognized following the rationale of *Stolt-Nielsen v. Animal-Feets International Corporation*, 130 S. Ct. 1758 (2010), that a party cannot be subject to a class arbitration unless the arbitration contract indicates consent to the class arbitration. Even if the class waiver is severed, then it is unconscionable under *Brewer*, and the appropriate action is to invalidate the entire arbitration provision as unconscionable.

In the case of *Ruhl v. Lee's Summit Honda*, No. SC 90601 (Mo. 2010), the Supreme Court Judge Teitleman, writing for the Court, found an arbitration contract unconscionable, which held that a party cannot be subject to class arbitration unless the arbitration contract indicates consent to class arbitration. In this case, as in *Brewer*, the class arbitration waiver makes it clear that Respondent did not consent to class arbitration. Because Respondent cannot be compelled to participate in class arbitration, it is an insufficient remedy simply to sever an unconscionable class waiver. Therefore, if the class waiver is unconscionable, under *Brewer*, the appropriate remedy in this case is to invalidate the entire arbitration provision as unconscionable. There was substantial evidence to support the trial court's judgment that the arbitration clause was not enforceable.

The Agreement is also substantively unconscionable as Respondent is denied the right to discovery. As part of the arbitration provision, the parties agree to give "broad rights to discovery as are available in a lawsuit." (L.F. 62). If Respondent was forced into arbitration, Respondent would be denied the right to discovery in preparing to fully arbitrate the matter. The arbitration provision is vague on what discovery would be permitted, meaning the scope of discovery would be subject to arbitration under the Agreement.

This prohibition on discovery would be detrimental to Respondent's claim as she would not be able to find out discoverable information as to the fraudulent misrepresentation and similar conduct Respondents have engaged in. Under the Missouri Manufacturing Practice Act, Respondent is entitled to seek punitive damages and the inability to discovery Defendant's knowledge and prior similar actions would impact Respondent's ability to prove and recover punitive damages.

Appellants seek enforcement of the compulsory arbitration clause, in spite of Respondent's claim that the conduct of the acts of the Defendant state a claim or cause of action under the Missouri Merchandising Practices Act Section 407.025 et seq. The Missouri Merchandising Practices Act provides for certain types of damages, attorneys' fees and punitive damages, if conduct is found to be an unlawful merchandising practice.

The enforcement of the mandatory arbitration clause as sought by Defendant can in effect preclude the Respondent from the rights and remedies that

she would have under the Missouri Merchandising Practices Act. In *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005), in which a customer alleged a wireless telephone service provider improperly included additional charges on billing statements, and the customer then filed claims against the provider in violation of the Missouri Merchandising Practices Act. In reviewing the case, the Court of Appeals concluded the arbitration provision was unconscionable, finding that the arbitration provision was in fine print on the back of the sheet sent to Respondent and was insufficient to call it to the customer's attention to the waiver of their substantial rights guaranteed under statutes and Constitution. The arbitration provision cited by the Defendant limits the ability to recover all damages as provided by the Missouri Merchandising Practices Act, all incidental, consequential damages, punitive and exemplary damages, and attorneys' fees. These damages are expressly available to Respondent under Missouri Statute Section 407.025 RSMo and the limitation within the arbitration provision limits the recovery of the Respondent that could be recovered under the Missouri law.

The provisions under the *Whitney* arbitration provision prohibited the consolidation of claims or class actions, and provisions precluding incidental, consequential, punitive or exemplary damages as well as attorneys fees and provisions requiring the consumer to bear the cost of the arbitration. The Court in *Whitney* held that an average person would not reasonably expect that a dispute as existed in the *Whitney* case would resolve through arbitration, as it in effect would

effectively strip consumers of the protection accorded to them under the Missouri Merchandising Practices Act and unfairly allow companies to insulate themselves from the consumer protection laws of this state. The result would be unconscionable and in direct conflict with the legislature's declared public policies as evidenced by the Missouri Merchandising Practices Act.

At no time was Respondent able to change or negotiate on any of the terms contained within the arbitration provision, something of which she was required to sign as paperwork on the transaction.

At its very core, Appellants' reliance on *AT&T Mobility, LLC v. Concepcion,* 131 S. Ct. 1740 (U.S. Sct. 2011) is misplaced. Appellants state, without analysis, that "the times in which consumer contracts were anything other than adhesive are long past." *AT&T Mobility LLC,* 131 S.Ct. At 1750. Recognizing that a contract may be one of adhesion is one thing. Finding that an adhesion contract may strip a consumer of substantive rights that were available in state court is quite another. On the contrary, the Supreme Court in *AT&T Mobility LLC* recognized that:

The final phrase of § 2 [of the FAA], however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate

is at issue.

Id.

Further, Appellants are overstating the reach of *AT&T Mobility LLC.* As recognized by this court in Brewer II, *AT&T Mobility LLC* merely found that California's *Discover Bank* rule was preempted by the federal arbitration act. *AT&T Mobility LLC* did not find that all state court unconscionability defenses were preempted. *Brewer v. Missouri Title Loans,* 364 S.W.3d 486, 490 (Mo. banc 2012)

Respondent cannot recall ever seeing the Arbitration Clause. As this Court noted in *Brewer v. Missouri Title Loans,* 364 S.W.3d 486 (Mo. banc 2012), *AT&T Mobility LLC* permits state courts to apply state law defenses to the formation of a particular contract at issue. *Brewer,* 364 S.W.3d at 491-92. For example, "high pressure sales tactics, unreadable fine print, misrepresentation or unequal bargaining positions all indicate deficiencies in the making of a contract. *Brewer*, 364 S.W.3d at 489 (citing *Whitney v. Alltel Commc'ns, Inc,* 173 S.W.3d 300, 308 (Mo. App. 2005). In this case, it is clear that Appellants used high pressure sales tactics and took advantage of unequal bargaining power. Respondent stated she was keep waiting for several hours before being shown into the Finance and Insurance office. (L.F. 104). While in the Finance and Insurance office, Respondent was not given time to read the "many documents" placed before her, but rather, she was rushed and told to "sign here, sign here, and here." (L.F. 104). The word "arbitration" was never mentioned to Respondent. (L.F. 104). At the

time she bought the Suzuki, Respondent was never told that she was waiving her rights to participate in a class action, to a jury trial, to a court trial, or other valuable rights. (L.F. 104). Appellants took affirmative steps to ensure that Respondent was not aware of the contents of the documents.

Clearly, Respondent was defrauded into the Arbitration Agreement, or the same was induced by duress. As a result, it should not be enforced.

The trial court could have easily found that the arbitration clause was unconscionable and unenforceable where the arbitration clause was non-negotiable and difficult for the average consumer to understand, the terms were extremely one-sided, the seller did not waive its right to use self help repossession to gain possession of the collateral, and the clause provided that should consumer obtain an award in excess of $100,000, the seller was entitled to a new arbitration before three arbitrators rather than one.

The purpose of the unconscionability doctrine is to guard against one-sided contracts, oppression and unfair surprise. *Brewer,* 364 S.W.3d at 492-93 (citing *Cowbell LLC v. Borc Building and Leasing Corp.,* 328 S.W.3d 399, 405 (Mo.App. 2010).

The arbitration clause at issue here has a term that provided "The arbitrator's award shall be final and binding on all parties, except in that event that an arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new

arbitration under the rules of arbitration organization by a three-arbitrator panel.

(L.F. 62).

This clause is particularly troublesome. First, it offends one of the main goals of arbitration, that is finality. Rather, if a plaintiff recovers an award of more than $100,000, the defendant is automatically granted a new arbitration. Appellants argue on the one hand that "the whole point of entering into an arbitration agreement it to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L. Ed. 2d 444 (1985)." And at the same time, appellants argue that a clause granting appellants an automatic new hearing, from scratch, does not offend the goals of the FAA, simplicity, informality, and expeditious resolution of claims. In sum, the very clause that Appellants want this court to enforce would frustrate one of the FAA's objectives.

Moreover, the plain language of this "do over" clause is very troubling.

It states that if the award for a party is $0 the party may request a new hearing with three arbitrators. One reasonable construction of this clause would grant appellants a new hearing if respondent wins an award of less than $100,000, but the award for appellants was zero. Clearly, such a clause is not reasonable under the circumstances. A "do over" may be appropriate for grammar school children playing kick ball in a school yard, but not when a party is attempting to enforce her rights to recover for another party's deceptive conduct.

In sum, this court should affirm the decision of Judge Powell for these reasons or upon such other and further reasons as the court deems just and equitable. For, in affirming a trial court, this court may affirm under and cognizable theory, even if that theory was not advanced by the trial court. *Midwest Asbestos Abatement Corp., v. Brooks,* 90 S.W.3d 480 (Mo. Ct. App. E.D. 2002); *Mortenson v. Leatherwood Construction, Inc*. 137 S.W.3d 529 (Mo. App. S.D. 2004).

Conclusion

The Court should affirm the trial court's order and remand this case for further proceedings in the circuit court.

Respectfully submitted by

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Certificate of Compliance

I hereby certify that I scanned the enclosed CD-ROM for viruses and it is virus free, and that I used Wordperfect 4x for word processing. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and that this brief contains 7661 words.

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Certificate of Service

I hereby certify that on September 18, 2012, I filed a true and accurate Adobe PDF copy of this Substitute Brief of the Respondent and her Appendix via the Court's electronic filing system, which notified the following of that filing:

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